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No. 40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

CHRYSLER CORPORATION, DESOTO MOTOR CORPORATION, PLYMOUTH MOTOR CORPORATION, DODGE BROTHERS CORPORATION, and CHRYSLER SALES CORPORATION, APPELLANTS

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA.

BRIEF FOR THE APPELLANTS

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BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The trial court delivered no opinion. It made no findings of fact or conclusions of law.

JURISDICTION

The decree of the district court was entered December 21, 1940 (R. 117-118). The appeal was allowed by the district judge for the Northern District of Indiana on February 14, 1941 (R. 121). The jurisdictional statement required by Rule 12 of this Court was filed March 25, 1941, and probable

jurisdiction was noted on April 14, 1941, under the provisions of the Expediting Act of February 11, 1903, c. 544, Sec. 2, 32 Stat. 823, as amended, 15 U. S. C. Sec. 29, and Section 238 of the Judicial Code, as amended, 28 U. S. C. Sec. 345.

QUESTIONS PRESENTED

Whether, the parties not consenting and the issues being controverted by the answer of defendants, the court below erred in modifying an antitrust consent decree by extending one of its restraints:

(1) Without taking or requiring proof;

(2) Without allegations or proof of changed conditions or unlawfulness under the Sherman Act;

(3) Upon bare allegations of mistake, particularly where they are obviously ill-founded upon the face of the decree;

(4) Upon a motion made long after the time prescribed by Rule 60 (b) within which it was apparently drawn; and

(5) Without requiring the filing of a supplemental complaint upon which the issues might have been specified, joined, and tried.

STATEMENT

This is an appeal from a final decree of the District Court of the United States for the Northern District of Indiana (R. 117-118), made in December, 1940, modifying a final decree of the same court theretofore entered with the consent of the parties in November, 1938, in a suit in equity instituted by the United States under the Sherman Antitrust Act (R. 29-53).

Original proceeding and decree.—On November 7, 1938, the United States filed its complaint, under Section 1 of the Sherman Act, against Chrysler Corporation and certain of its subsidiaries (hereinafter, for brevity, referred

to as Chrysler) and against Commercial Credit Company and certain of its subsidiaries (R. 1-14). The bill, among many other things, alleged that during the period of three years immediately preceding its filing, Chrysler, General Motors, and Ford had manufactured and sold approximately 90% of the automobiles manufactured in the United States, of which General Motors produced 7,000,000 automobiles while Chrysler and Ford had each produced 4,000,000 (R. 5); and that these three manufacturers had conspired separately with their respective affiliated finance companies (R. 8). There was no charge that Chrysler, Ford, or General Motors had conspired with each other. The bill prayed, among many other things, that Chrysler be restrained "from acquiring in any way an interest in any finance company or by gift, loan or otherwise rendering financial assistance to any finance company" (R. 13).

On the same day the answers of Chrysler and the Commercial Credit group were filed (R. 15, 24).

On November 15, 1938, the court entered a consent decree as the final decree of the court, reciting at the outset that (R. 29-30):

> The United States of America filed its petition herein on November 7, 1938; each of the respondents appeared and filed its answer to such petition, and asserted the truth of its answer and its innocence of any violation of law; the petitioner and the said respondents desire to avoid the expenses of a trial of the issues therein and the loss of time occasioned thereby; no testimony having been taken, each of the respondents consented to the entry of this decree without any findings of fact, upon condition that neither such consent nor this decree shall be considered as an admission or adjudication that it has violated any statute; and the United States of America by its counsel * * * consented to the entry of this decree and to each and every provision thereof, and * * * moved the court for this injunction.

The decree, among other restraints and requirements imposed upon Chrysler, provided in Section 12 that Chrysler (R. 46):

> shall not make any loan to or purchase the securities of Respondent Finance Company [the Commercial Credit Company and its subsidiaries] or any other finance company.

This restriction was limited, however, by the second paragraph of the same section:

> It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1941, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude [Chrysler] from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a.

The decree as a whole contains not only a broad and detailed injunction restraining Chrysler from doing certain acts but also conditionally limits the time during which the restraints are to continue. These conditions were, as is obvious from the face of the decree, inserted for the purpose of relieving Chrysler from the competitive disadvantage of the restraints if and to the extent that the Government should not succeed in imposing like or similar restraints upon General Motors within the times agreed upon in the

decree.[1] Paragraph 15 of the decree further protects Chrysler from competitive disadvantage from competitors other than General Motors and Ford if those other competitors become substantial (R. 50-52).

The subsequent motion of the United States.—On December 17, 1940, the United States filed its "motion" for modification of the consent decree (R. 54-58). In substance the motion alleged that, at the time of entry of the consent decree, the length of time required to procure a decree against General Motors Corporation "was by mistake of the parties underestimated" and that, on October 4, 1940 (more than two years after the entry of the consent decree and only three months before the expiration of the restriction of paragraph 12 thereof), the United States had "filed complaint * * * against General Motors * * * whereby it seeks the remedy referred to in" the express condition of paragraph 12 of the decree, "to wit, that General Motors * * * shall divest itself of all ownership and control of General Motors Acceptance Corporation and all interest therein."[2] The motion prayed that Section 12 of the consent decree be modified by substituting the date "January 1, 1942" for the date "January 1, 1941" and by adding a provision that:

> The modification of this decree shall not preclude the plaintiff from seeking a further extension of the time within which the aforesaid decree may be entered.

[1] In 1938 General Motors Acceptance Corporation, the wholly-owned finance company subsidiary of General Motors Corporation, realized a net income of $12,000,000. *United States* v. *General Motors Corporation*, 121 F. (2d) 376, 386.

[2] In the criminal proceedings, which had been instituted against General Motors Corporation and its affiliated corporations prior to the Chrysler decree, the jury returned a verdict acquitting all of the individual defendants and finding the four corporate defendants guilty. Judgment was entered November 18, 1939. The Circuit Court of Appeals for the Seventh Circuit affirmed on May 1, 1941, and denied a petition for rehearing on July 2, 1941. *United States* v. *General Motors Corporation*, 121 F. (2d) 376. A petition for certiorari was filed August 8, 1941, No. 352, October Term, 1941.

An affidavit of a representative of the Department of Justice, attached to the motion, averred that it was based on original documents and facts learned in his handling of the matters referred to (R. 58).

The answer of appellants denied the allegations of the motion and prayed (R. 59-61):

> (1) That said motion be dismissed forthwith; or
>
> (2) That, if said motion be not dismissed, plaintiff be required to plead or elect with particularity (a) whether it relies upon mistake, surprise, inadvertence, or excusable neglect (if so, setting forth with certainty the facts upon which such claim is made) or (b) whether it relies upon changed basic conditions of fact or law (if so, setting forth with particularity such changed conditions); and that defendants, thereafter, be given sufficient notice and opportunity to prepare [their] response and defense; or
>
> (3) That, if said motion be not dismissed and if plaintiff is not required to plead further, the motion now filed herein be set down for hearing for the taking of proof on the merits, upon such terms and conditions as will assure defendants due notice of the issues and adequate opportunity to prepare [their] response or defense thereto.

The truth of the statements in the answer was supported by affidavit of counsel for Chrysler (R. 61-62).

The Government's motion was set for December 21, 1940 (R. 54). At that time, counsel for appellants renewed the contention that the Government must show on what basis it grounded its asserted right to open the decree (R. 103). The question being put to counsel for the United States, he answered (R. 103):

> Well, if your Honor please, if you ask me the straight question what I am relying on, I am relying on the good judgment of the court to correct an injustice.

Now, I don't believe that I should make any further contention in this case.

As is shown by the caption of the Clerk to the decree of the District Court, omitted in printing, no evidence was required by the court below or presented by the Government (Original R. 182). After argument and without ruling on the prayers contained in appellants' answer, the court below granted the motion from the bench (R. 117), and, on the same day, December 21, 1940, made its order of modification of the final decree, thereby directing the changing of the date in the second paragraph of Section 12 of the consent decree to "January 1, 1942" as requested by the Government (R. 117-118). The court made no findings of fact and stated no conclusions of law. There was no opinion.

SPECIFICATION OF ERRORS

1. The United States District Court for the Northern District of Indiana erred in modifying the consent decree dated November 15, 1938, on the showing in this case.

2. Said District Court erred in modifying said consent decree on motion without the acquiescence of the parties thereto and over the objection of the appellants herein.

3. Said District Court erred in failing to dismiss the motion for modification of said consent decree filed more than six (6) months after entry of said consent decree.

4. Said District Court erred in enjoining the appellants herein from acquiring and retaining ownership of, control over, or interest in any finance company until after January 1, 1942, in violation of the right expressly conceded by the United States and granted in Section 12 of the consent decree, dated November 15, 1938.

5. Said District Court erred in failing to make findings of fact and state its conclusions of law.

ARGUMENT

I

THE GRANTING OF THE INJUNCTIVE RELIEF TO THE GOVERNMENT WITHOUT INTRODUCTION OF ANY SUPPORTING EVIDENCE WAS CLEARLY VIOLATIVE OF DUE PROCESS

The motion of the United States is far from clear as to the basis upon which relief is sought (R. 56-58). Indeed, as pointed out above, counsel for the Government, who had apparently prepared the motion, was not certain what his ground was—other than that he was invoking "the good judgment of the court" to correct an asserted injustice (R. 103). As was indicated in the answer, appellants believed it might have been intended to allege either mistake or a change in conditions (R. 59-61).

Regardless of the nature of the ground for relief which the United States may finally settle upon as being the basis of its motion, it is plain that, after denial by answer, the Government, as the moving party asserting the affirmative of the issue, ~~sustained~~ had the burden of proving all the facts necessary to establish the right to the imposition or extension of the injunction against Chrysler. *Young* v. *Grundy*, 6 Cr. 51; *Lilienthal's Tobacco* v. *United States*, 97 U. S. 237, 267; *Henderson* v. *Carbondale Coal and Coke Co.*, 140 U. S. 25.

Here no evidence was offered by the Government (Original R. 182). The only support for the motion was the affidavit of counsel. But it is well settled that an affidavit being purely *ex parte* cannot be considered on final hearing. *Cucullu* v. *Hernandez*, 103 U. S. 105, 110. The defendants were entitled as a matter of fundamental right to a trial of the issues of fact with opportunity to cross-examine. *United States* v. *Int. Harvester Co.*, 274 U. S. 693, 703; *Hop Bitters Manuf'g Co.* v. *Warner*, 28 Fed. 577; *Hyman* v. *Pottberg's Ex'rs*, 101 F. (2d) 262, 265-266; *Parrot Speed*

Fastener Corp. v. *E. W. Carpenter Mfg. Co.*, 26 Fed. Supp. 622, 623; *Vonherberg* v. *City of Seattle*, 20 F. (2d) 247, 248.

To treat the affidavit as substantive evidence upon the questions of fact involved, as this Court has said in *United States* v. *Int. Harvester Co.*, 274 U. S. 693, 703:

> violates the fundamental rules of evidence entitling the parties to a trial of issues of fact, not upon hearsay, but upon the testimony of persons having first hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination.

There was, clearly, no proof submitted by the Government.

The court below itself at first apparently recognized that the granting of injunctive relief without evidence was beyond its power (R. 106-107), but thereafter—without indicating a reason for the change of mind—granted the Government's request without proof. Whatever the cause for this plain attempt to dispense with one of the cornerstones of due process, the error is so apparent as to make further argument superfluous.

II

THE GOVERNMENT HAS NEITHER ALLEGED NOR PROVED FACTS REQUISITE TO JUSTIFY THE EXTENSION OR MODIFICATION OF THE DECREE

It is plain that no change in condition is alleged to have occurred which would justify the imposition or extension of the restraint upon Chrysler. All that appears is that the Government has failed to comply with the "express condition" (R. 46) and specific terms of the decree. This is not such a change in condition as will support the modification, extension, or imposition of injunctive restraint. The Government, if it contended that this were such a change in condition, would be avoiding and making capital of its own default and failure.

In *United States* v. *Swift & Co.*, 286 U. S. 106, 119-120, this Court said:

> Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead

> us to change what was decreed after years of litigation with the consent of all concerned. * * * What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone * * * and the composition held for nothing.

When applied to an attempt to modify a consent decree so as to enlarge the restraints, it is submitted that the "grievous wrong" contemplated by the above-quoted language of the *Swift* case, requires, at the very least, a showing, independently of the conduct previously restrained and abandoned by consent of the parties defendant, that the new restraint sought to be imposed is necessary in order to prevent an existing or threatened violation of law.

It is important to note that the ownership, control, or interest in finance companies is only one of the many activities of Chrysler enjoined by the decree (Decree, Pars. 6 and 9, R. 32-43). An activity (such as the ownership or control of finance companies) initially enjoined because deemed to be an adjunct of other unlawful activities may, of course, be in itself entirely valid and so be permitted to be resumed after the passage of a period of time during which such other unlawful and perpetually enjoined activities have been abandoned. It is recognized also that restraints which could not be enforced against opposition may by consent of the defendants become binding as part of a decree. *United States* v. *Swift & Co.*, 286 U. S. 106, 116-117. Indeed, the decree herein specifically recited that (R. 30):

> each of the respondents consented to the entry of this decree without any findings of fact, upon condition that neither such consent nor this decree shall be considered as an admission or adjudication that it has violated any statute.

Again, the decree, Section 12, second paragraph, plainly and expressly recognized that ownership by Chrysler of a

finance company after January 1, 1941, would not violate the Sherman Act, for the provision for removal of the restraint against ownership of a finance company upon the stated and express condition appearing in Section 12 is one for absolute termination rather than the mere suspension such as is conditionally provided as to another type of restraint in Section 12a(3). Therefore, the inclusion of this conditioned restraint in the original consent decree against ownership or control of finance companies affords no basis for assuming that such a prohibition is now necessary to avoid violation of law or that such a restrictive provision could have been, or now could be, sustained in court against opposition.

The law is well established that to justify invoking equity jurisdiction for the imposition of a restraint—whether by way of "modification" of an earlier consent decree or otherwise—a present or threatened violation of the antitrust laws must be alleged and shown. *Swift and Company* v. *United States,* 196 U. S. 375, 396; *United States* v. *United States Steel Corporation,* 223 Fed. 55, 59, aff'd *United States* v. *U. S. Steel Corp.,* 251 U. S. 417, 445; *Industrial Ass'n* v. *United States,* 268 U. S. 64, 84; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 179; *Appalachian Coals, Inc.* v. *U. S.,* 288 U. S. 344, 377; *United States* v. *E. I. du Pont de Nemours & Co.,* 188 Fed. 127, 129, 130; *United States* v. *E. I. du Pont de Nemours & Co.,* 273 Fed. 869, 873; *Aluminum Co. of America* v. *Federal Trade Commission,* 299 Fed. 361, 363, 365, cert. denied 261 U. S. 616.

Clearly such facts have been neither alleged or shown here—much less has there been that "clear showing of grievous wrong" required by this Court in *United States* v. *Swift & Co., supra.* It is not even suggested that the original decree has not been complied with, that Chrysler now owns an interest in a finance company, that Chrysler is threatening to acquire such an interest, or has failed in

any other way to comply with the decree in all respects. Indeed, the court below, by reiterated statement, appeared to justify the extension of the restraint here complained of by the very fact that the defendants were not threatening to acquire such an interest (R. 89, 93, 100, 114, 115). In so doing the court in effect ruled that the mere filing of a motion for injunction, without allegation of any violation of law either present or threatened, operates to place upon the defendant the burden of showing that it will be hurt by the imposition (or extension) of the proposed (or expiring) restraint—a proposition so repugnant to the established rules of justice as to require no rebuttal here.

Under the circumstances of this case, no grievous wrong or threatened violation having been either alleged or proved, there was no power in the court, without consent of the defendants, to modify the decree. *Industrial Ass'n* v. *United States*, 268 U. S. 64, 84; *United States* v. *United States Steel Corporation*, 223 Fed. 55, 161, aff'd 251 U. S. 417; *United States* v. *E. I. du Pont de Nemours & Co.*, 188 Fed. 127, 129, 130. As pointed out by this Court in *United States* v. *Int. Harvester Co.*, 274 U. S. 693, 703, any attempt to modify the decree so as to impose upon the defendants requirements other than those essential to the establishment of lawful competitive conditions—

> would plainly be repugnant to the agreement approved by the court and embodied in the decree, which has become binding upon all parties, and upon which the [defendant] has in the exercise of good faith, been entitled to rely.

Finally, in order to avoid the foregoing state of the law, the Government by its motion alleges that the trial court has "by section numbered 18 of the aforesaid consent decree" retained jurisdiction for the purpose of modifying it "as justice may require" (R. 57). But this paragraph

clearly applies only to applications for modification made by "any respondent" or "the respondents" to meet "economic or competitive conditions" whether "new or unforeseen" (R. 52-53). The Government has misread, and can reap no benefit from the paragraph 18 which it cites. There is, of course, the usual reservation clause in paragraph 14 of the decree, which the Government does not refer to, and which does not contain the phrase "as justice may require" (R. 50); moreover, such a reservation adds nothing to the decree or rights of the Government since "if the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of chancery" to modify the decree where it has been shown to have "been turned through changing circumstances into an instrument of wrong" (*United States* v. *Swift & Co.*, 286 U. S. 106, 114-115).

It is, therefore, plain that the motion fails utterly to allege any ground for the modification or extension of the decree, and the record discloses none.

III.

UPON THE FACE OF THE MOVING PAPERS, THE BARE ALLEGATIONS OF MISTAKE OF THE PARTIES ARE INSUFFICIENT TO JUSTIFY A MODIFICATION OF THE DECREE

The motion does not assert that the consent decree does not contain the true agreement of the parties or that it was intended by them that, despite the language of the decree, recognition of the right of Chrysler to invest in a finance company should await final determination of the General Motors suit, however long that determination might be delayed. Indeed, no such allegation could be made, and if made would be patently erroneous, in view of the unequivocal "express condition" (R. 46) of the decree to which the Government, with full knowledge of the facts, freely consented.

The unequivocal language of the consent decree was that (R. 46):

> If an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1941, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude [Chrysler] from acquiring and retaining ownership of and/or control over or interest in any finance company.

Diligence by the Government is neither relevant nor decisive. Nothing in the decree indicates that the Government was required to proceed at all against General Motors to compel it to divest itself of ownership and control of General Motors Acceptance Corporation. Nothing on the face of the decree requires the Government even to attempt to do so. The Government's motion sets forth various considerations which the Government appeared to believe more important than compliance with the express condition to which it had consented. It delayed more than two years before even bringing its civil proceeding against General Motors, by which alone it could have prevented the lapse of the restriction of Paragraph 12 of the decree.

Against the express language of the decree it is obviously irrelevant to allege, as the United States does in its motion, that at the time of the execution of the decree "it was then believed by the parties" that the case pertaining to General Motors could be more promptly disposed of, or that the time "was by mistake of the parties underestimated," or that "the parties hereto, at the time of the entering of the consent decree, anticipated that such criminal case would be disposed of without extensive and lengthy litigation" (R. 55).

Such allegations plainly fail to state a ground for relief when the agreement shows on its face that the alleged mis-

take relates to a matter which the contracting parties had in mind as doubtful and as to the happening of which they took the consequent risk. *Denver & S. L. Ry. Co.* v. *Moffatt Tunnel Improvement Dist.*, 35 F. (2d) 365, mod. 45 F. (2d) 715, cert. denied 283 U. S. 837; *Chicago & N. W. Ry. Co.*, v. *Wilcox*, 116 Fed. 913, 914; 5 Williston, Contracts (Rev. Ed.) § 1543, p. 4332.

Indeed, the very fact that the obtaining of a decree against General Motors before January 1, 1941, is referred to as an "express condition" (R. 46) clearly shows that the parties regarded that event as uncertain. Had the happening of the event before January 1, 1941, been relied upon by the parties as a certainty, then the apparent contingency would have been illusory, its character as a condition would have been destroyed, and the whole of paragraph two of Section 12 would have been unnecessary.

That, in framing the "express condition" set forth above, the parties dealt with matters peculiarly within the knowledge and competence of the Government itself is evident. In the first place, the Government was the moving party in the type of litigation contemplated by the express condition. It, and it alone, could bring the proceedings, and in large measure it controlled their procedural history. It had been conducting litigation under the Sherman Act, both civil and criminal, for fifty years and had a staff of experienced attorneys devoting their entire time to the subject. Accordingly, it cannot truthfully say that it mistook the time required—particularly in view of its long delay in filing a civil suit against General Motors and in view of the lack of any allegations of unusual or extraordinary delays beyond those encountered in antitrust litigation from day to day.

Moreover, the decree itself provides different conditions for terminating its various different restraints. Thus Section 12a (3) (i, ii, iii) of the decree (R. 48-49) differs sig-

nificantly from the express condition of Section 12 discussed above. Among other differences, Section 12a provides for "suspension" rather than absolute termination in the event equivalent relief against General Motors is not secured by the Government; it provides for such suspension on January 1, 1940, whereas it was agreed that the absolute termination under the express condition of Section 12 could not occur until a year later; and it recognizes a verdict of guilty in a criminal proceeding as being for some purposes equivalent relief against General Motors, whereas the express condition here involved requires a civil "final order or decree not subject to further review" (R. 48-49).

Obviously, both parties dealt with full knowledge of every factor of litigation which might affect the operation of the express condition of Section 12. But the allegations of the motion are insufficient as well for another reason. They fail to take into account the fact that the consent decree is a judicial act. *United States* v. *Swift & Co.*, 286 U. S. 106, 115. Since the decree is a determination by the court of the restraints necessary to prevent violation of law, it is obviously irrelevant that the parties may have been under a misapprehension as to the possible date of a future event. Any error of the court in determining the degree of restraint necessary to protect against future wrong was waived by the consent to the decree. *Nashville & Railway Co.* v. *United States*, 113 U. S. 261, 266; *Swift & Co.* v. *United States*, 276 U. S. 311, 324.

IV.

THE MOTION OF THE GOVERNMENT TO MODIFY THE DECREE WAS REQUIRED TO BE DISMISSED AS UNTIMELY UNDER RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The motion, assuming for the moment that it was the proper mode of procedure, was apparently filed under the misapprehension that it was permissible under Rule 60(b), which reads:

> On motion the Court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect.

But the very next sentence of this rule provides:

> The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken.

Here the final decree was taken or entered November 15, 1938 (R. 29). The "motion" was not filed until December 17, 1940 (R. 54), more than two years after the consent decree. Plainly, under the express provisions of Rule 60(b) the motion was required to be dismissed as out of time. *Cassell* v. *Barnes,* 1 F. R. D. 15; *Moran* v. *Moran,* 31 F. Supp. 227; *Nachod & United States S. Co., Inc.* v. *Automatic Signal Corp.,* 32 F. Supp. 588; *Maryland Casualty Company* v. *Cox,* 104 F. (2d) 354, 357.

V.

ASSUMING THAT IT HAS A RIGHT TO THE RELIEF IT SEEKS, THE GOVERNMENT HAS MISTAKEN ITS REMEDY AND, FOR ITS PURPOSE, MUST PROCEED BY SUPPLEMENTAL COMPLAINT

It is abundantly clear from the foregoing that no mistake of the parties is involved here. Indeed, the court below went so far as to say (R. 105-106):

> There is no claim that it [the consent decree] was made mistakenly or through error. * * * No, they are not relying on any mistake made, as I understand it.

The circumstances, the specific language of the decree, and the conduct of the Government all emphasize that there was, and could have been, no mistake of the parties.

So far as the motion of the Government may be said to be grounded upon a change in conditions, it is, of course, not within the language or purpose of Rule 60(b). Upon

a matter such as this, involving disputed change of basic matters of fact, a motion is plainly inappropriate. It was essential that the United States file a motion for leave to file a supplemental complaint under Federal Rule of Civil Procedure No. 15(d) in order that issues might properly be made and the case regularly heard and decided. *Osage Oil & Refining Co.* v. *Continental Oil Co.*, 34 F. (2d) 585, 589; *Kaw Valley Drainage Dist.* v. *Union Pac. R. Co.*, 163 Fed. 836, 837.

Rule 15 (d) provides that, as to the "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented," a supplemental pleading may be filed, but then only upon motion for the consent of the court and "upon reasonable notice and upon such terms as are just" with provision for a responsive pleading where advisable. In the present case, no attempt was made by the court below or the Government to comply with these requirements.

The prejudicial error of the failure of the United States to proceed by supplemental complaint, as is customary in attempting to secure the relief it here desires, is illustrated by (1) the failure of the court below to require the Government as the moving party to adduce evidence upon material and controverted allegations, (2) the granting of injunctive relief without allegations or proof of changed conditions and unlawfulness warranting such relief, (3) the assumption of a "mistake of the parties" not tenable upon the record and insufficient to justify the removal of the "express condition" of the decree, (4) the inappropriateness and inapplicability of the Government's motion under the terms of Rule 60 (b) under which it was apparently drawn, and (5) the entry of the modification of the decree without findings or conclusions.

Indeed, the failure of the court below to make findings or conclusions emphasizes the fundamental error. It is the

concomitant of the failure to require proof in a contested cause. It leaves entirely to speculation the theory and grounds upon which the court below proceeded. Particularly in an antitrust case which comes to this Court by direct appeal, such findings and conclusions of law have been held to be essential to intelligent and orderly presentation and proper disposition of a case. Federal Rules Civ. Proc. 52; *Interstate Circuit* v. *United States,* 304 U. S. 55, 56-57; *Railroad Commission* v. *Maxcy,* 281 U. S. 82, 83.

Under these circumstances, the modification of the decree must be set aside and the Government required to proceed, if it desires to proceed, in accordance with recognized judicial methods which will accord the parties defendant their day in court.

CONCLUSION

It is respectfully submitted that the order of the District Court dated December 21, 1940, modifying the final consent decree should be reversed. The order was made and entered without testimony by the moving party, though the issues were sharply controverted; there was neither allegation nor proof of changed conditions and unlawfulness warranting modification of the decree; the allegations of mistake were neither sufficient nor were they proved; the motion was made long after the time for such motions had expired; and, in any event, the Government's remedy, if any, was by supplemental complaint rather than by mere motion.

Respectfully,

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